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Supreme Court, U.S.
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No: __ - ____

IN THE
# Supreme Court of the United States

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Andrew Bestor

Petitioner

v.

Federal Bureau of Investigation

Respondent

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On Petition for Writ of Certiorari to
The United States Court of Appeals
for the District of Columbia

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## SUPPLEMENTAL APPENDIX

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Andrew Bestor, *pro se* [Petitioner]
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## United States District Court for the District of Columbia Case 1:06-cv-01745-RMU

ORDER GRANTING THE DEFENDANT'S MOTION TO DISMISS THE PLAINTIFF'S WASHINGTON FIELD OFFICE FOIA REQUEST AND GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT AS TO THE PLAINTIFF'S FBI HEADQUARTERS AND SEATTLE FIELD OFFICE FOIA REQUESTS [August 6, 2007]..... 4
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Case: 08-5076 Document: 01215506262 Page: 1
United States Court of Appeals For The District of Columbia Circuit, No. 08-5076, September Term 2008, 1:06-cv-01745, Filed On: February 11, 2009
Andrew S. Bestor, Appellant vs. Federal Bureau of Investigation, Appellee
BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges
ORDER Upon consideration of the petition for rehearing, it is ORDERED that the petition be denied. Per Curiam
FOR THE COURT: Mark J. Langer, Clerk BY: /s/ Michael C. McGrail Deputy Clerk

Case: 08-5076 Document: 01215419620 Page: 1
United States Court of Appeals For The District of Columbia Circuit, No. 08-5076, September Term 2008, 1:06-cv-01745, Filed On: December 23, 2008
Andrew S. Bestor, Appellant vs. Federal Bureau of Investigation, Appellee
BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges
ORDER Upon consideration of the motion for summary affirmance, the opposition and the supplements thereto, the reply, and the lodged

surreply and the supplements thereto, it is ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F. 2d 294, 297 (D.C. Cir. 1987)(per curiam). The affidavits the Federal Bureau of Investigation ("FBI") provided to this court and the district court "show beyond a material doubt that it has conducted a search reasonably calculated to uncover all relevant documents" under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552. Morley v. CIA, 508 F.3d 1108, 1114 (D.C. Cir. 2007)(quoting Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). The FBI has explained that a file number appeared at the bottom of a released document because the relevant file contains all correspondence from the FBI to members of Congress regarding inquiries from their constituents. The number indicated that a copy of the document, a letter to a former U.S. Senator, had been placed in the file. Thus, the reference to this file number in the released document does not suggest the existence of additional responsive records. See Meeropol v. Meese, 790 F.2d 942, 954 (D.C. Cir. 1986). The district court correctly held that Bestor's other arguments are merely "speculative claims about the existence of other documents" that "do not rebut the presumption of good faith" or create genuine issues of fact, making summary judgment appropriate. See Wilbur v. CIA, 355 F.3d 675, 678 (D.C. Cir. 2004) (holding that "mere speculation that as yet

uncovered documents might exist" is not enough to "undermine the determination that the agency conducted an adequate search for the requested records").

Pursuant to D.C. Circuit Rule 36, this disposition will not be punished. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41. Per Curiam

Case 1:06-cv-01745-RMU Document 12 Filed 08/06/2007 Page 1 of 1 In The United States District Court For the District Of Columbia Andrew Scott Bestor, Plaintiff, v. Federal Bureau Of Investigation, Defendant. Civil Action No.: 06-1745 (RMU) Document No: 8 **ORDER GRANTING THE DEFENDANT'S MOTION TO DISMISS THE PLAINTIFF'S WASHINGTON FIELD OFFICE FOIA REQUEST AND GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT AS TO THE PLAINTIFF'S FBI HEADQUARTERS AND SEATTLE FIELD OFFICE FOIA REQUESTS**

For the reasons stated in this court's memorandum opinion separately and contemporaneously issued this 6th day of August 2007, it is hereby ORDERED that the defendant's motion to dismiss the plaintiff's Washington Field Office FOIA claim is GRANTED. It is FURTHER ORDERED that the defendant's motion for summary judgment as to the plaintiff's

FBI Headquarters and Seattle Field Office FOIA claims is GRANTED. SO ORDERED.
RICARDO M. URBINA United States District Judge

Case 1:06-cv-01745-RMU Document 13 Filed 08/06/2007 Page 1 of 15 In The United States District Court For the District Of Columbia
Andrew Scott Bestor, Plaintiff, v. Federal Bureau Of Investigation, Defendant. Civil Action No.: 06-1745 (RMU) Document No: 8 **MEMORANDUM OPINION GRANTING THE DEFENDANT'S MOTION TO DISMISS[1] THE PLAINTIFF'S WASHINGTON FIELD OFFICE FOIA REQUEST AND GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT AS TO THE PLAINTIFF'S FBI HEADQUARTERS AND SEATTLE FIELD OFFICE FOIA REQUESTS**

**1. INTRODUCTION**

The pro se plaintiff, Andrew Bestor, submitted three separate requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, to the Federal Bureau of

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1 Although the defendant styles its motion as one for summary judgment, it argues that the plaintiff failed to exhaust his administrative remedies with respect to his Washington Field Office Freedom of Information Act, 5 U.S.C. 552, request. Def's Mot. for Summ. J. ("Def.'s Mot.") at 5. Therefore, the court construes the defendant's challenge as to this claim as a motion to dismiss for failure to state a claim for which relief can be granted. Hidalgo v, F.B.I., 344 F.2d 1256, 1260 (D.C. Cir. 2003).

Investigation ("FBI"): one to FBI Headquarters ("FBIHQ"), one to the Washington Field Office ("WFO") and one to the Seattle Field Office ("SFO"). Dissatisfied with the FBI's responses to his requests and alleging that the FBI has unlawfully refused to disclose all documents relating to him, the plaintiff brings suit against the defendant2 pursuant to FIOA. The defendant moves for summary judgment, contending that the DOJ conducted a reasonable search for records responsive to the plaintiff's requests and that the plaintiff failed to exhaust his administrative remedies. Because the plaintiff did not exhaust his administrative remedies for his request filed with the WFO, the court grants the defendant's motion to dismiss that claim. Because the defendant conducted an adequate search as to the plaintiff's other two requests, the court grants the defendant's motion for summary judgment as to those claims.

## II BACKGROUND

### A. Factual History

#### 1. The FBI Headquarters Request

On May 17, 2005, the plaintiff submitted a FOIA

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2 The defendant asserts that the United States Department of Justice ("DOJ") should be substituted for the FBI as a proper party. Def.'s Mot. at 1 n.1. Because resolution of this matter does not affect the court's analysis herein, it does not rule on whether the DOJ should be substituted as a proper party.

request to FBIHQ seeking "copies of all documents and files the FBI has on [the plaintiff]." Def.'s Mot. for Summ. J. ("Def.'s Mot.") Ex. A; Compl. [para.] 2.3 The FBI assigned the request number 1021054 (the "FBIHQ request"), and on May 23, 2005, it advised the plaintiff that a document search at FBIHQ located no records pertinent to the request. Def.'s Mot. Ex. B. On June 7, 2005, the plaintiff filed an administrative appeal with the Office of Information and Privacy ("OIP"). Def.'s Mot. at 4. After discussions with OIP personnel, the FBI conducted an additional search. Id. On September 6, 2005, the FBI produced one page of responsive information and advised the plaintiff to submit a "new request to the Washington Field Office directly." Compl. Ex. 1; Def.'s Mot. at 4.

**2. The Washington Field Office Request**

On October 1, 2005, the plaintiff submitted a FOIA request directly to the WFO, which the defendant designated as number 1031496 (the "WFO request").

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3 Because the plaintiff does not contest the defendant's factual assertions as to the chronology of the plaintiff's FOIA submissions to the FBI, the court relies on the facts as provided by the defendant's motion for summary judgment. See Raulerson v. Ashcroft, 2003 WL 102950, at *1 n.1.(D.D.C. Jan. 7, 2003)(deriving the background information from the defendant's motion for summary judgment because the plaintiff did not contest the facts as provided by the defendant).

Def.'s Mot. at 4. On October 25, 2005, the defendant informed the plaintiff that it did not locate any records responsive to his request and advised him of his right to appeal the determination. Id. Ex. G. The defendant contends that the plaintiff filed no administrative appeal with the OIP regarding this determination. Def.'s Mot. at 5, Decl. of David M. Hardy (Hardy Decl.") [para] 13.

**3. The Seattle field Office Request**

On June 7, 2005, the plaintiff submitted a FOIA request to the Seattle Field Office for all "files, data, notes, electronic files, or other types of records and systems of files the FBI - and the Seattle Field Office of the FBI - may have concerning [the plaintiff]." Def.'s Mot. [para]9. On September 23, 2005, the FBI advised the plaintiff that his request had been assigned number 1029403 (the "SEFO request") and that it located no responsive records. Id. [para]10. The plaintiff appealed the SEFO determination on September 27, 2005. Id. [para] 11.

The defendant states that after receiving the plaintiff's complaint initiating the instant suit, the FBI conducted a second search of the FBIHQ, WFO and SEFO, and on January 29, 2007, FBIHQ provided the plaintiff with two unredacted pages. Id. Ex.H. On September 5, 206, the OIP affirmed the SEFO's initial determination. Compl. Ex. 1-2.

**B. Procedural History**

On October 12, 2006, the plaintiff filed suit alleging the FBI unlawfully withheld information he

requested in each of his FOIA requests submitted to the FBIHQ, the WFO, and the SEFO. Compl. [para] 1. On February 6, 2007, the defendant filed a motion for summary judgment asserting that there are no genuine issues of material fact, that the plaintiff has not exhausted his administrative remedies, and that it conducted adequate searches for each request. Def.'s Mot. at 2-8. In response, the plaintiff filed an opposition contending that the defendant has documents about him that it has not released. Pl.'s Opp'n to Def.'s Mot. to Dismiss ("Pl.'s Opp'n") at 1. The court now addresses the defendant's motion.

## III. ANALYSIS

### A. Legal Standard for Summary Judgment

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Diamond v. Atwood, 43 F.3d 1538, 1540 (D.C. Cir. 1995). In deciding whether there is a genuine issue of material fact, the court is to review the record in the light most favorable to the party opposing the motion, giving the non-movant the benefit of all favorable inferences that can reasonably be drawn from the record and the benefit of any doubt as to the existence of any genuine issue of material fact. Adickes v. S.H. Kress & Co., 398

U.S. 144, 157-59 (1970). To determine which facts are "material," a court must look to the substantive law on which each claim rests. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A "genuine issue" is one whose resolution could establish an element of claim or defense and, therefore, affect the outcome of the action. Celotex, 477 U.S. at 322; Anderson, 477 U.S. at 248.

FOIA affords the public access to virtually any federal government record that FOIA itself does not specifically exempt from disclosure. 5 U.S.C. [Sec.] 552; Vaughn v. Rosen, 484 F.2d 820, 823 (D.C.Cir 1973). FOIA confers jurisdiction on the federal district courts to order the release of improperly withheld or redacted information. 5 U.S.C. [Sec.] 552(a)(4)(B). In a judicial review of an agency's response to a FOIA request, the defendant agency has the burden of justifying nondisclosure, and the court must ascertain whether the agency has sustained its burden of demonstrating that the documents requested are exempt from disclosure under FOIA. 5 U.S.C. [Sec] 552(a)(4)(B); Al-Fayed v. CIA, 254 F.3d 300, 305 (D.C. Cir. 2001); Summers v. Dep't of Justice, 140 F.3d 1077, 1080 (D.C. Cir. 1998). An agency may meet this burden by providing the requester with a Vaughn index, adequately describing each withheld document and explaining the exemption's relevance. Summers, 140 F.3d at 1080; Vaughn, 484 F.2d 820 (fashioning what is now commonly referred to as a "Vaughn index").

The court may grant summary judgment to an agency on the basis of its affidavits if they:

> [(a)] describe the documents and the justifications for nondisclosure with reasonably specific detail, [(b)] demonstrate that the information withheld logically falls within the claimed exemption, and [(c)] are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.

Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981). While an agency's affidavits are presumed to be in good faith, a plaintiff can rebut this presumption with evidence of bad faith. SafeCard Servs., Inc. v. Sec. & Exch. Comm'n, 926 F.2d 1197, 1200 (D.C. Cir. 1991)(citing Ground Saucer Watch, Inc. v. CIA, 692 F.2d 770, 771 (D.C.Cir. 1981)). But such evidence cannot be comprised of "purely speculative claims about the existence and discoverability of other documents." Id.

**B. The Court grants the Defendant's Motion to Dismiss the Plaintiff's Claim Relating to the WFO Request**

**1. Legal Standard for FOIA Exhaustion of Remedies**

"Exhaustion of administrative remedies is generally required before seeking judicial review 'so that the agency has an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision.'" Wilbur v. Cent.

Intelligence Agency, 355 F.3d 675, 677 (D.C. Cir. 2004)(quoting Oglesby v. United States Dep't of Army, 920 F.2d 57, 61 (D.C. Cir. 1990). In the FOIA context, the exhaustion requirement is a prudential consideration, not a jurisdictional prerequisite, and therefore a plaintiff's failure to exhaust does not deprive the court of subject-matter jurisdiction. Id. But as a prudential consideration, the exhaustion requirement may still bar judicial review if both (1) the administrative scheme at issue and (2) the purpose of exhaustion support such a bar. Id. (citing Hidalgo v. Fed. Bureau of Investigation, 344 F.3d 1256, 1258-59 (D.C. Cir. 2003)). With regard to the first factor, the D.C. Circuit has concluded that FOIA's administrative scheme supports barring judicial review.4 Id. (citing Hidalgo, 344 F.3d at

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4 Specifically, the court has stated that

> [t]he FOIA expressly requires that an agency receiving a request for information (i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and (ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal... If the denial of the request is upheld on appeal, the agency must notify the person making such request of the provisions

1259). As for the second factor, courts look to see whether barring judicial review would "prevent[] premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." Weinberger v. Salfi, 422 U.S. 749, 765 (1975); see also Hidalgo, 344 F.3d at 1259 (applying the Weinberger description of the purpose of exhaustion in the FOIA context). If the agency fails to answer the request within 20 days, FOIA deems the requester to have constructively exhausted administrative remedies and permits immediate judicial review. 5 U.S.C. [Sec] 552(a)(6); Judicial Watch, Inc. v. Rossetti ("Judicial Watch I"), 326 F.3d 1309, 1310 (D.C. Cir. 2003)(citing Oglesby, 920 F.2d at 64-65). That said, "[i]f the agency responds to the request after the twenty-day statutory window, but before the requester files suit, the administrative exhaustion requirement still applies." Judicial Watch I,

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> for judicial review of the determination... As we have previously concluded, this statutory scheme requires each requestor to exhaust administrative remedies.

Hidalgo v. Fed Bureau of Investigation, 344 F. 3d 1256, 1259 (D.C.Cir 2003)(internal quotations and citations omitted).

326 F.3d at 1310. Moreover, courts have held that only a valid FOIA request can trigger an agency's FOIA obligations, and that "failure to file a perfected request therefore constitutes failure to exhaust administrative remedies." Dale v. Internal Revenue Serv., 238 F. Supp.2d 99, 103 (D.D.C. 2002)(citing 5 U.S.C. [Sec] 552(a)(3) and 26 CFR [Sec] 601.702(c)(5)); see also Judicial Watch I, 326 F.3d at 1311-12 (basing its analysis on the defendant's argument that the plaintiff had not constructively exhausted because the non-conforming FOIA request could not be considered "received" and thus could not trigger the 20-day limit); accord Church of Scientology v. Internal Revenue Serv., 729 F. 2d 146, 150 (D.C. Cir. 1986)(noting that FOIA requires "requests [to] be made in accordance with published rules").

**2. The Plaintiff Failed to Exhaust Administrative Remedies for the WFO Request**

The defendant argues that the plaintiff failed to file an appeal to its adverse determination on his WFO request. Def.'s Mot. at 8. Although the plaintiff generally alleges that "he has 'exhausted' his administrative appeals," Compl. [para] 2, he does not allege that he filed an appeal specifically for his WFO request.

It is well established that a plaintiff "may have exhausted administrative remedies with respect to one aspect of a FOIA request... and yet not have exhausted [his] remedies with respect to another

aspect of a FOIA request." Dettmann v. Dep't of Justice, 802 F.2d 1472, 1477 (D.C. Cir. 1986). Such is the case here. The record demonstrates that the defendant filed appeals as to his FBIHQ and SEFO requests. Def.'s Mot. Exs. C-E, K-L. But, the plaintiff failed to allege that he filed an administrative appeal specifically as to his WFO request. Moreover, because the defendant responded to the plaintiff's initial WFO request within the allotted 20 days, Def.'s Mot. Exs. F-G the plaintiff is not automatically excused from the administrative exhaustion requirement, Judicial Watch I, 326 F.3d at 1310. Although the failure to exhaust administrative remedies under FOIA is not a jurisdictional bar, the court may nevertheless dismiss a claim that has not been pursued through all administrative channels. Wilbur, 355 F.3d at 677. As states, supra, the court may dismiss a claim if the administrative scheme at issue and the purposes of exhaustion support such a bar. Id. "The purposes and policies of the exhaustion requirement are to prevent premature interference with agency processes [and] a failure to exhaust precludes [judicial review] if the agency had no opportunity to consider the very issues that [the plaintiff] raised in court." Wiggins v. Nat'l Credit Union Admin., 2007 WL 259941, at *5 (D.D.C. Jan. 30, 2007)(internal citations omitted). The plaintiff challenges the defendant's response to the WFO request as inadequate, and this is the precise issue the defendant would have addressed had the plaintiff appealed the initial response. Therefore, the court

concludes that a review of the plaintiff's claim relating to the WFO request would interfere with the administrative process, and the plaintiff's failure to exhaust bars this claim. Clemmons v. U.S. Dep't of Justice, 2007 WL 1020796, at *5 (D.D.C. Mar. 30, 2007)(stating that exhaustion was required after a plaintiff was made aware of his right to appeal in letters from defendant and dismissing the complaint for failure to exhaust)(citing Hidalgo, 344 F.3d at 1259). The court, therefore, grants the defendant's motion to dismiss the plaintiff's claim as to the plaintiff's WFO request.

**C. The Court Grants the Defendant's Motion for Summary Judgment as to the Plaintiff's Claim Relating to his FBIHQ and SEFO Requests**

**1. Legal Standard for FOIA Adequacy of Agency Search**

"A requester dissatisfied with the agency's response that no records have been found may challenge the adequacy of the agency's search by filing a lawsuit in the district court after exhausting any administrative remedies." Valencia-Lucena v. United States Coast Guard,180 F.3d 321, 326 (D.C.Cir. 1999). To prevail on summary judgment, "the agency must demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents." Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 890 (D.C.Cir. 1995)(internal quotations and citations omitted). An agency must search for documents in good faith,

using methods that are reasonably expected to produce the requested information. Valencia-Lucena, 180 F.3 at 326 (citing Oglesby, 920 F.2d at 68). The principal issue is not whether the agency's search uncovered responsive documents, but whether the search was reasonable. Oglesby, 920 F.2d at 67 n.13 (citing Meeropol v. Meese, 790 F.2d 942, 952-53 (D.C. Cir. 1986); Moore v. Aspin, 916 F. Supp. 32, 35 (D.D.C. 1996). The agency need not search every record in the system or conduct a perfect search. SafeCard Servs., Inc. v. Sec & Exch. Comm'n, 926 F.2d 1197, 1201 (D.C. Cir. 1991); Meeropol, 790 F.2d at 952, 956. Nor need the agency produce a document where "the agency is no longer in possession of the document[ ] for a reason that is not itself suspect." SafeCard Servs., 926 F.2d at 1201.

Instead, to demonstrate reasonableness, the agency must set forth sufficient information in affidavits for the court to determine, based on the facts of the case, that the search was reasonable. Nation Magazine, 71 F.3d at 890 (citing Oglesby, 920 F.2d at 68). While an agency's affidavits are presumed to be in good faith, a plaintiff can rebut this presumption with evidence of bad faith. SafeCard Servs., 926 F.2d at 1200. But such evidence cannot be comprised of "purely speculative claims about the existence and discoverability of other documents." Id. If the record raises substantial doubts regarding the agency's efforts, "particularly in view of well defined requests and positive indications of overlooked materials," summary judgment is not appropriate. Valencia-

Lucena, 180 F.3d at 326 (internal quotations and citations omitted).

**2. The Defendant Conducted an Adequate Search with Respect to the Plaintiff's FBIHQ and SEFO Requests**

**a. The FBI's Search was Reasonable**

The defendant assets that it conducted an adequate search and that it provided the plaintiff with all responsive records pursuant to his requests. Def.'s Mot. at 15. The plaintiff argues that the defendant has not provided him with all relevant documents and that the court should determine whether the documents the defendant has allegedly withheld are exempt. Pl.'s Opp'n at 11.

When a FOIA request "does not specify the locations in which an agency should search, the agency has the discretion to confine its inquiry to a central filing system if additional searches are unlikely to produce any marginal return." Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 28 (D.C.Cir.1998)(citation omitted), see also Raulerson v. Ashcroft, 271 F. Supp. 2d 17, 22 (D.D.C. 2002)(noting that if the "FBI believes that a search of its [central records system] is sufficient, it need not go further"). To meet the standard of reasonableness, the FBI search need only be adequate. Rothschild v. Dep't of Energy, 6 F. Supp. 2d 38, 40 (D.D.C. 1998). The defendant sets forth a detailed account of how it conducted its search in response to the plaintiff's requests. Hardy Decl. [para] 19-25. In response to the plaintiff's

FBIHQ and SEFO requests, the FBI conducted a search of the central records system ("CRS"), which contains administrative, applicant, criminal, personnel, and other files compiled to fulfill the FBI's mandated law enforcement responsibilities. Id. The FBI initially ran a "main search" using a search tool that seeks out entries in the CRS where "Andrew Scott Bestor" was the primary subject matter of the electronic entry. Id. [para] 25. The FBI also ran a "reference search" seeking entries where the CRS system cross-referenced "Andrew Scott Bestor" under the "main" entry for another individual, organization or subject matter. Id. Based on the foregoing, the courts concludes that the FBI's efforts were adequate and that they were reasonably calculated to uncover all relevant documents. Stolt-Nielsen Transp. Ground LTD. v. United States, __ F. Supp. 2d __, 2007 WL 942073, at *3 (D.D.C. Mar. 28, 2007)(stating that an agency search of the records systems in which it is likely to find responsive records satisfies the reasonable search requirement, and the court "must accord 'substantial weight' to agency affidavits" detailing the agency's search)(citing Goland v. C.I.A., 607 F.2d 339, 352 (D.C. Cir. 1978)).[5]

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5 The plaintiff cites case law relating to the requirement that all reasonably segregable information be released pursuant to a FOIA request. Pl's Opp'n at 2. The court notes that, indeed, "[i]f a document contains exempt information, the agency must still release 'any

**b. The Plaintiff has Not Established that the FBI Failed to Act in Good Faith**

The plaintiff alleges that the FBI has failed to act in good faith by intentionally withholding records of advertisements he ran that discussed the FBI, a media release he mailed to the FBI, and telephone conversations he had with FBI agents in the 1990s. Compl. [para] 2; Pl.'s Opp'n at 3. Although the defendant does not explicitly address this allegation, it characterizes its search procedures as reasonable and argues it did not recover any responsive documents relating to the plaintiff. Def.'s Mot. at 2, 9. Because an agency search need not be perfect,

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reasonably segregable portion' after deletion of the nondisclosable portions." Oglesby v. U.S. Dep't of Army, 79 F.3d 1172, 1176 (D.C.Cir. 1996)(quoting 5 U.S.C. 552). This requirement, however, is not applicable in the instant circumstances. The defendant asserts, and the plaintiff does not dispute, that it released three unredacted documents to the plaintiff. Def.'s Mot. at 7-8. In addition, the defendant argues that it has withheld no exempt information. Id. at 9. Because the plaintiff received these documents in full, and because the defendant asserts that these are the only documents responsive to the plaintiff's FOIA requests, the plaintiff has provided nothing to demonstrate that the defendant has failed to reveal reasonably segregable information. See Kidder v. F.B.I., 2007 WL 1020784, at *12 (D.D.C. Mar. 29, 2007)(stating that "[i]f a record contains information that is exempt from disclosure, any reasonably segregable information must be released after deleting the exempt portions...").

Rothschild, 6 F. Supp. 2d at 40, the issue is not whether the records exist in the FBI database, but whether the FBI acted in good faith to conduct a search that was reasonably calculated to find responsive documents, Nation Magazine, 71 F.3d at 890. To succeed on his claims, the plaintiff must produce more than "purely speculative claims about the existence and discoverability of other documents." SafeCard Servs., 926 F.2d at 1200. Absent evidence to the contrary, the court accords the FBI's affidavit concerning the reasonableness of its search a presumption of good faith. U.S. Dep't of State v. Ray, 502 U.S. 164, 179 (1991)(noting that if there is not a scintilla of evidence that tends to impugn the integrity of a government report, the court will generally accord government records and official conduct a presumption of legitimacy).

The plaintiff proffers one piece of evidence that he argues demonstrates a lack of good faith on the part of the defendant. In the plaintiff's administrative appeal to his FBIHQ request, he noted that previously he filed FOIA requests in 1999 and 2001. Def.'s Mot. Ex. C. In response to the 2001 request, the plaintiff indicates that the FBI produced a letter by Arthur Radford Baker of the FBI's Office of Public and Congressional Affairs sent to Senator George Allen. Compl. Ex. 3. The postscript to the letter read "based on available information, the only reference in ACS records possibly identifiable with Andrew S. Bestor is an FOIPA request." Id. The plaintiff argues that this document "suggests [that the plaintiff] is

indexed," Pl.'s Opp'n at 3, and that because the FBI has not released documents concerning this reference, it shows that the FBI "lied to him on previous occasions" and demonstrates a lack of good faith, Compl. [para] 3. But, the postscript only contains a solitary reference relating to a FOIA request by the plaintiff. The text does not refer to entries in ACS records of the documents the plaintiff alleges the defendant is withholding, namely, telephone calls with FBI agents, advertisements, or media releases relating to the plaintiff. While it may be possible to infer that there are documents not in the ACS records system identifiable with the plaintiff, these speculative claims about the existence of other documents do not rebut the presumption of good faith. SafeCard Servs., 926 F.2d at 1200. Moreover, the FBI's subsequent efforts to conduct a more extensive search that did produce additional documents undercuts the plaintiff's contention that the FBI lacked good faith. See Ground Saucer Watch, Inc. v. C.I.A., 692 F.2d 770, 772 (D.C. Cir. 1981)(stating that a de novo search by an agency significantly undercuts the argument that an earlier non-cooperation was done in bad faith). Because the court concludes that the FBI's searches with respect to the plaintiff's FBIHQ and SEFO requests were reasonably calculated to uncover responsive documents and were done in good faith, the court grants the defendant's motion for summary judgment as to these requests.

## IV. CONCLUSION

For the foregoing reasons, the court grants the defendant's motion to dismiss the plaintiff's claim relating to his WFO request and grants the defendant's motion for summary judgment as to the plaintiff's remaining claims. An order consistent with this Memorandum Opinion is separately and contemporaneously issued this 6th day of August, 2007. RICARDO M. URBINA, United States District Judge

Case 1:06-cv-01745-RMU Doc 15 Filed 03/26/2008 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
ANDREW SCOTT BESTOR, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, Defendant. Civil Action No.: 06-1745 (RMU) Document No: 14
**ORDER GRANTING IN PART AND DENYING IN PART THE PLAINTIFF'S REQUEST FOR RELIEF FROM JUDGMENT** For the reasons stated in the court's Memorandum Opinion separately and contemporaneously issued this 26th day of March 2008, it is hereby ORDERED that the plaintiff's motion for relief from judgment is GRANTED in part and DENIED in part. SO ORDERED. RICARDO M. URBINA United States District Court Judge.

Case 1:06-cv-01745-RMU Doc 16 Filed 03/26/2008 Page 1 of 10 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
ANDREW SCOTT BESTOR, Plaintiff, v. FEDERAL

BUREAU OF INVESTIGATION, Defendant. Civil Action No.: 06-1745 (RMU) Document No: 14,

**MEMORANDUM OPINION GRANTING IN PART AND DENYING IN PART THE PLAINTIFF'S REQUEST FOR RELIEF FROM JUDGMENT**

**1. INTRODUCTION**

The pro se plaintiff, Andrew Scott Bestor, sued the Federal Bureau of Investigation ("FBI") for its alleged failure on three separate occasions to disclose all documents relating to him in its possession pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. [Sec] 552. The defendant moved to dismiss arguing that the plaintiff failed to exhaust his administrative remedies on a FOIA request made to the Washington Field Office ("WFO"). The defendant also moved for summary judgment as to the plaintiff's requests to FBI Headquarters ("FBIHQ") and Seattle Field Office ("SEFO") because the agency conducted a search that was reasonable and in good faith. The court granted both motions. On August 13, 2007, the plaintiff filed a motion pursuant to Federal Rule of Civil Procedure 60(b) requesting that the court grant him relief from this judgment. Because no change in circuit law has occurred and because there is no newly discovered evidence since the time of judgment, the court denies the plaintiff's request for reconsideration.

The plaintiff brought his motion within 10 days of the court's order, and therefore, the court also considers his request as one for relief pursuant to Rule 59(e). As the court's judgment contained no

substantive legal errors, the court denies the plaintiff the relief he seeks as to the FBIHQ and SEFO requests. Because the plaintiff has made clear that his complaint does not challenge the defendant's handling of his WFO request, the court grants in part the plaintiff's motion and vacates its previous ruling as it pertains to this request.

## II. BACKGROUND[1]

On August 6, 2007, the court granted the defendant's motion to dismiss the plaintiff's WFO request, concluding that the plaintiff had failed to exhaust his administrative remedies. See generally Mem. Op. (Aug. 6, 2007). In that same ruling, the court granted the defendant's motion for summary judgment as to the plaintiff's FBIHQ and SEFO requests, concluding that the defendant had conducted an adequate, good faith search in satisfaction of its obligations under FOIA. Id. As evidence that the defendant acted in good faith, the court pointed to the fact that after its initial records search, the defendant voluntarily conducted a second more extensive search and provided the plaintiff with two additional unredacted pages from its files. Id. at 14.

On August 13, 2007, the plaintiff moved for reconsideration of the court's ruling pursuant to Federal Rule of Civil Procedure 60(b). The court now

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1 For a full recitation of the factual history of the case, see the court's Memorandum Opinion dated August 6, 2007.

considers each of the plaintiff's arguments pursuant to Rule 60(b). And, because he brought his motion within the 10 days required by Rule 59(e), the court also analyzes his claims under the more liberal standard of that rule.

## III. Analysis

### A. The Court Denies the Plaintiff's Motion Because the Plaintiff is Not Entitled to Relief Pursuant to Rule 60(b).

The plaintiff's request pursuant to Rule 60 does not present a meritorious claim. First, the plaintiff is not entitled to relief under this rule because there has been no change in Circuit law. Similarly, no new evidence has been discovered to allow this court to grant relief under Rule 60(b)(2). Accordingly, this court denies the plaintiff's motion for relief under Rule 60(b).

#### 1. Legal Standard for Relief Under Federal Rule of Civil Procedure 60(b)

In its discretion, the court may relieve a party from an otherwise final judgment pursuant to any one of the six reasons set forth in Rule 60(b). FED. R. CIV. P. 60(b); Lepkowski v. Dep't of Treasury, 804 F.2d 1310, 1311-12 (D.C. Cir. 1986). First, the court may grant relief from a judgment involving "mistake, inadvertence, surprise, or excusable neglect." FED. R. CIV. P. 60(b). Such relief under Rule 60(b) turns on equitable factors, notably whether any neglect was excusable. Pioneer Inv. Servs. Co. v. Brunswick Ass'n Ltd. P'ship, 507 U.S. 380, 392 (1993). Second,

the court may grant relief where there is "newly discovered evidence" that the moving party could not have discovered through its exercise of due diligence. FED. R. CIV. P. 60(b). Third, the court may set aside a final judgment for fraud, misrepresentation, or other misconduct by an adverse party. Id.; Mayflower Extension, Inc. v. Magee, 241 F.2d 453, 454 (D.C. Cir. 1957). Specifically, the movant must show that "such 'fraud' prevented him from fully and fairly presenting his case," and that "the fraud is attributable to the party or, at least, to counsel." Richardson v. Nat'l R.R. Passenger Corp., 150 F.R.D. 1, 7 (D.D.C. 1993)(Sporkin, J.)(citations omitted). Fourth, the court may grant relief where the judgment is "void." FED. R. CIV. P. 60(b).
A judgment may be void if the court lacked personal or subject-matter jurisdiction in the case, acted in a manner inconsistent with due process, or proceeded beyond the powers granted to it by law. Eberhardt v. Integrated Design & Constr., Inc., 167 F.3d 861, 871 (4th Cir. 1999). Fifth, the court may grant relief if the "judgment has been satisfied, released, or discharged, or a prior judgment upon which it was based has been reversed... or it is no longer equitable that the judgment should have prospective application." FED. R. CIV. P. 60(b); Twelve John Does v. District of Columbia, 841 F.2d 1133,1138 (D.C. Cir. 1988)(noting that not all judgments having continuing consequences are "prospective" for the purposes of Rule 60(b)). Sixth, the court may grant relief from a judgment for "any... reason justifying

[such] relief." FED. R. CIV. P. 60(b). Using this final catch-all reason sparingly, courts apply it only in "extraordinary circumstances." Pioneer Inv. Servs., 507 U.S. at 393.

A party proceeding under one of the first three reasons must file his Rule 60(b) motion within one year after the judgment at issue. FED. R. CIV. P. 60(b). A party relying on one of the remaining three reasons may file his Rule 60(b) motion within a reasonable time. Id. The party seeking relief from judgment bears the burden of demonstrating that he satisfies the prerequisites for such relief. McCurry ex. rel. Turner v. Adventist Health Sys./Sunbelt, Inc., 298 F.3d 586, 592, (6th Cir. 2002).

**2. The Court Denies the Plaintiff's Rule 60(b)(1) Motion Because There has been No Change in Circuit Law**

First, the plaintiff argues that the court erred in considering his WFO FOIA request, which was not referenced in his complaint. Pl.'s Mot. at 1-2. To the plaintiff, the court's discussion of this request in its ruling constitutes a mistake or error within the meaning of Rule 60(b)(1). Id. at 2. Rule 60(b)(1) typically encompasses "mistake, inadvertence, surprise, or excusable neglect" of the parties, but this circuit also allows the rule to reach the court's alleged legal errors in the very limited situation when the controlling law of the circuit changed between the time of the court's judgment and the Rule 60 motion. Ctr. for Nuclear Responsibility, Inc., v. U.S. Nuclear Regulatory Comm'n, 781 F.2d 935,

939 (D.C.Cir. 1986). The plaintiff does not allege, nor could he, that an intervening change in law has occurred since the court issues its August 6, 2007 judgment. Accordingly, Rule 60(b)(1) is inapplicable, and the court denies the plaintiff's motion.

**3. The Court Denies the Plaintiff's Rule 60(b)(2) Motion Because the Plaintiff has Presented No Newly Discovered Evidence**

The plaintiff next alleges that the two documents the defendant provided in regard to the FBIHQ and SEFO FOIA requests are newly discovered evidence because the plaintiff received them after he filed suit. Pl.'s Mot. at 6. A court may indeed grant the plaintiff relief from a prior judgment when there is "newly discovered evidence" that the moving party could not have discovered through its exercise of due diligence. FED. R. CIV. P. 60(b). But, evidence is not new for the purposes of Rule 60(b)(2) if a party takes possession of it after the lawsuit commences but prior to trial. Duren v. First Gov't Mortgage & Investors Corp., 221 F.3d 195, 195 (D.C. Cir. 2000). Here, the plaintiff again argues that the two documents sent to him by the defendant on January 29, 2007 are newly discovered evidence for purposes of Rule 60(b)(2). Pl.'s Mot. at 6. Although the plaintiff received these materials after the lawsuit was filed, the plaintiff was in possession of these documents prior to filing his Memorandum in Opposition to the Defendant's Motion for Summary Judgment. Further, the defendant claims that it provided this information to the plaintiff in its motion for

summary judgment, and the plaintiff acknowledges receiving the information. Def.'s Mot. at 7-8; Pl.'s Opp'n to Def.'s Mot. for Summ. J. ("Pl.'s Opp'n") at 1. Far from being newly discovered evidence, the parties presented this evidence to the court, and the court weighed it in its consideration of both the defendant's motion to dismiss and motion for summary judgment. Mem. Op. (Aug. 6, 2007) at 14. Accordingly, the plaintiff's claim fails because he has not identified any newly discovered evidence which would permit this court to grant him relief from its prior judgment.

**B. The Court Grants in Part the Plaintiff's Motion for Relief Pursuant to Rule 59(e)**

Because the pro se plaintiff brought his motion within ten days of the court's entry of its August 6, 2007 order, the court will also consider the plaintiff's claims pursuant to the slightly more liberal standard of Federal Rule of Civil Procedure 59(e). Dorocon, Inc. v. Burke, 2005 WL 3454338, at *3 (D.D.C. Dec. 16, 2005). The plaintiff alleges that the court made a mistake of law by analyzing and dismissing his WFO request for failure to exhaust administrative remedies because he never addressed it as a claim in his complaint. Pl.'s Mot. at 2. The plaintiff also argues that the court erred in granting summary judgment on the FBIHQ and SEFO requests because he has provided sufficient examples of "government stonewalling in providing him data." Pl.'s Mot. at 5. As to the plaintiff's WFO request, the plaintiff makes clear that he never intended to submit that request

or the defendant's response to the court for review. Therefore, the court vacates its opinion as it relates to that request. Because the court's grant of summary judgment as to the plaintiff's FBIHQ and SEFO requests contained no mistake of law entitling the plaintiff to relief pursuant to Rule 59(e), the court denies his motion as to those requests.

**1. Legal Standard for Rule 59(e) Motion**

Federal Rule of Civil Procedure 59(e) provides that a motion to alter or amend a judgment must be filed within 10 days of the entry of the judgment at issue. FED. R. CIV. P. 59(e); see also Mashpee Wamponoag Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1098 (D.C. Cir. 2003)(stating that a Rule 59(e) motion "must be filed within ten days of the challenged order, not including weekends, certain specified national holidays (including Christmas Day and New Years Day), or any other day appointed as a holiday by the President"). While the court has considerable discretion in ruling on a Rule 59(e) motion, the reconsideration and amendment of a previous order is an unusual measure. Firestone v. Firestone, 76 F. 3d 1205, 1208 (D.C. Cir. 1996)(per curiam); McDowell v. Calderon, 197 F.3d 1253, 1255 (9th Cir. 1999). Rule 59(e) motions "need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear legal error or prevent manifest injustice." Ciralsky v. C.I.A., 355 F.3d 661, 671 (D.C. Cir. 2004)(quoting Firestone, 76 F.3d at 1208). Moreover,

"[a] Rule 59(e) motion to reconsider is not simply an opportunity to reargue facts and theories upon which a court has already ruled," New York v. United States, 880 F. Supp. 37, 38 (D.D.C. 1995), or a vehicle for presenting theories or arguments that could have been advanced earlier, Kattan v. District of Columbia, 995 F.2d 274, 276 (D.C. Cir. 1993); W.C. & A.N. Miller Cos. v. United States, 173 F.R.D. 1, 3 (D.D.C. 1997).

**2. The Court Grants the Plaintiff's Motion and Vacates its Judgment as to the WFO Request**

As discussed above, the plaintiff alleges that his complaint does not mention his WFO FOIA request, and so the court's discussion of this request in its Memorandum Opinion constitutes a mistake or error entitling him to relief on reconsideration. Pl.'s Mot. at 1-2. It is true that the complaint does not mention the WFO request. Indeed, the plaintiff's one-page complaint does not reference requests made to any FBI offices, although he does attach letters from FBIHQ and SEFO as exhibits. See Compl. The defendant first raised the plaintiff's WFO FOIA request in an effort to give a full history of the dealings between the parties and presumably to explore all the bases on which the plaintiff could allege that the FBI was in violation of FOIA. Def.'s Mot. at 8. In the plaintiff's opposition to the defendant's motion for summary judgment, he neither addresses the defendant's arguments that he failed to exhaust remedies for his WFO request, nor did he dispute that his WFO request was properly

before the court. See generally Pl.'s Opp'n to Def.'s Mot. The court is permitted to liberally construe the pleadings of a pro se plaintiff and to consider supplemental materials filed by a pro se litigant to clarify the claims presented. Greenhill v. Spellings, 482 F.3d 569, 572 (D.C. Cir. 2007). Therefore, in evaluating the parties' arguments at the summary judgment stage, the court analyzed all potential claims alleged by the plaintiff. The court, accordingly, made no mistake of law by referencing the WFO request in its Memorandum Opinion. Mem. Op. (Aug. 6, 2007) at 6. Nevertheless, the court is mindful that in the face of a vague complaint, the prudent course is to require of the plaintiff a more definite statement of his claims. See Powers-Bunce v. District of Columbia, 479 F. Supp. 2d 146 at 158-59 (D.D.C.2007)(treating the defendant's motion to dismiss as a motion for a more definite statement and ordering the plaintiff to provide more factual allegations). As mentioned, the plaintiff's one-page complaint does not make clear which requests to the defendant he is challenging. Supra at 7. Interpreting his motion for reconsideration as a more definite statement of his claims, therefore, the court recognizes that the plaintiff did not intend to submit his WFO request to the court for consideration. Pl.'s Mot. at 1 (stating that "the Court directly says Bestor is suing over the FOIA request he sent to the WFO which is not true"). Accordingly, the court grants in part the plaintiff's motion for reconsideration and vacates its ruling as it relates to

the plaintiff's WFO request.

**3. The Court Denies the Plaintiff's Motion as to the FBIHQ and SEFO Requests**

The plaintiff also alleges that the court incorrectly granted summary judgment in favor of the defendant as to the plaintiff's FBIHQ and SEFO requests. Pl.'s Mot. at 2-5. The plaintiff believes that the defendant is still withholding information related to such requests and as a result has not conducted a reasonable and good faith search. Id. at 3-5. But, the court concluded previously that the defendant demonstrated compliance with necessary search requirements.

To prevail on summary judgment with respect to the plaintiff's FBIHQ and SEFO requests the defendant need demonstrate "beyond material doubt that its search was reasonably calculated to uncover all relevant documents." Nation Magazine, Washington Bureau v. U.S. Customs Serv., 71 F.3d 885, 890 (D.C. Cir. 1995)(internal quotations omitted). The agency must search for documents in good faith and use methods that are reasonably expected to produce the requested information. Valencia-Lucena v. United States Coast Guard, 180 F.3d 321,326 (D.C. Cir. 1999). The defendant thoroughly explained the manner in which it searched its central records information system looking for information relating to the plaintiff. Mem. Op. (Aug. 6, 2007) at 12. In fact, the court's decision noted that the defendant had released two documents to the plaintiff after conducting yet another search after he filed his

lawsuit. Def.'s Mot. at 7-8; Mem. Op. (Aug. 6, 2007) at 14. Having determined such efforts to be reasonable, the court then considered whether the defendant had acted in good faith and concluded that it had. Mem. Op. (Aug. 6, 2007) at 13-14. The plaintiff's bald assertion that the defendant is withholding documents is not enough to demonstrate that the court clearly erred in determining that the defendant acted in good faith in conducting the search. SafeCard Servs., Inc. v. Sec. & Exch. Comm'n, 926 F.2d 1197, 1200 (D.C. Cir. 1991). Quite simply, no evidence suggests that the defendant was or is intentionally withholding documents related to the plaintiff, and the court concludes that it did not err in its initial decision. Nation Magazine, 71 F.3d at 890 (reasoning that the central question is whether the FBI acted in good faith and conducted a search that was reasonable). Therefore, the court declines to grant the plaintiff relief pursuant to Rule 59(e) as to the FBIHQ and SEFO requests.

## IV. CONCLUSION

For the foregoing reasons, the court denies the plaintiff's request for reconsideration pursuant to Rule 60(b)(1)&(2). The court grants in part the plaintiff's motion pursuant to Rule 59(e) and vacates its judgment as to the WFO request, but it denies the plaintiff's motion as to the rest of his claims. An order consistent with this Memorandum Opinion is separately and contemporaneously issued this 26th day of March, 2008. RICARDO M. URBINA, United States District Judge